

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re CLARENCE BURDAN on Habeas Corpus.

C056099

ORIGINAL PROCEEDING: Petition for Writ of Habeas Corpus.
Petition granted.

Michael Sattris, under appointment by the Court of Appeal,
for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette,
Chief Assistant Attorney General, Julie L. Garland, Senior
Assistant Attorney General, Jennifer A. Neill, Supervising
Deputy Attorney General, and Pamela B. Hooley, Deputy Attorney
General, for Respondent.

On the evening of November 22, 1983, Clarence Burdan shot
and killed his wife while the two sat in her car in front of
their residence discussing their marital problems. Burdan
thereafter entered a negotiated plea of guilty to second degree

murder and, on June 21, 1984, was sentenced to an indeterminate term of 15-years-to-life in state prison.

On February 9, 2005, the Board of Parole Hearings (Board) conducted a parole consideration hearing and found Burdan suitable for parole. However, the Governor reversed the Board's decision, concluding Burdan's release would pose an unreasonable risk to public safety because of the "grave" nature of the conviction offense.

Burdan filed a petition for writ of habeas corpus in the superior court, which that court denied on August 7, 2006. On June 29, 2007, Burdan filed a petition for writ of habeas corpus in this court. On August 16, 2007, we issued an order to show cause to Matthew C. Kramer, Warden of Folsom State Prison (the Warden) in order to review the Governor's decision.

The Warden filed a return to our order to show cause and Burdan filed a denial to the return. In a published decision issued on March 24, 2008, we concluded the Governor's denial of parole was not supported by the record and granted Burdan's petition. (*In re Burdan* (2008) 161 Cal.App.4th 14.)

The Supreme Court granted the Warden's petition for review. (*In re Burdan*, review granted July 9, 2008, S163311.) Thereafter, the high court issued two companion decisions, *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), clarifying the appropriate standard for reviewing a parole decision of either the Board or the Governor. The court transferred the matter back to this

court with directions to vacate our earlier decision and reconsider the matter in light of *Lawrence* and *Shaputis*.

On November 3, 2008, we vacated our earlier decision. Having reconsidered the matter as directed, we again conclude the Governor's decision is not supported by the record and grant Burdan's petition.

FACTS AND PROCEDURAL HISTORY

At his parole consideration hearing, Burdan acknowledged the accuracy of the information concerning the underlying murder as set forth in the 1984 probation report. That report reveals the following:

Burdan married the victim, Charity Adams, in April 1974. At the time of the murder, they had two children.

At approximately 8:00 p.m. on November 22, 1983, Stephen Hall, a Sacramento police officer who was off duty and at home at the time, walked outside and heard a horn honk and a female voice calling his name with some urgency. Hall lived next door to the Burdans. Hall began walking toward a Honda Civic in which he could see Burdan and his wife arguing and struggling.

When Hall got within five feet of the car, he heard three small-caliber gunshots. He immediately ran back into his house and retrieved his own gun. When Hall came back outside, he heard two more shots.

Hall yelled at Burdan to open the car window, and Burdan complied. Hall could see that Burdan was fumbling with something on his lap and heard him say several times, "I can't

make it work. I can't make it work. I want to finish the job.'" Burdan was emotionally upset, shaking, nervous and distraught.

Hall reached in and grabbed a handgun away from Burdan. Burdan struggled briefly over the gun, saying, "'I want to finish this I want to make it work.'" Hall got Burdan out of the car, where Burdan said, "'Steve, give me your gun. I won't hurt you. I just want to kill myself.'" Hall pulled Burdan away from the car with some difficulty, because Burdan "was walking very poorly and was not well coordinated." Burdan kept asking for Hall's gun and appeared to be looking at Hall as if to size him up and determine if he could take the gun by force. Hall knocked Burdan to the ground.

Hall eventually handcuffed Burdan to a light post and said he wanted to check on Burdan's wife. Burdan said, "'Steve, it's no use. I know she's dead.'"

The victim had eight gunshot wounds, five entry and three exit. One wound was to the left temple, two to the upper right temple, one on the left side of the neck, one on the right side of the neck, and three to the chest.

The handgun used by Burdan was a single-action, .22-caliber revolver. In order to make the gun fire, it was necessary to cock the hammer before each shot. Burdan had borrowed the gun the day before from an acquaintance. At the time, he told the acquaintance he wanted the gun for target practice. The gun was loaded when Burdan received it. Five live rounds of ammunition were found in Burdan's jacket after he was taken into custody.

It was later revealed that Burdan and his wife had been having marital difficulties for a month or two before the shooting. Burdan had discovered that his wife had begun a sexual affair with a female coworker. He had in fact observed his wife and the other woman engaging in sex at the coworker's home two or three days before Burdan committed the crime. Burdan had briefly moved out of the home, but then returned and made his wife move out the day before the shooting.

On the day of the shooting, Burdan had apparently called his wife and arranged to meet with her that evening. Also on that day, the victim called her sister and told her that she had informed Burden she was leaving him, he had asked her to stay, she had said she could not, and Burdan had said he understood.

A neighbor told police the victim had spoken with her two weeks before the murder and said she was afraid that Burdan was going to do something to hurt himself. The victim said Burdan was depressed and indicated he needed to see a psychiatrist. Others also reported that Burdan appeared depressed for about two weeks before the murder. A coworker described Burdan as being "close-mouthed and keeping his personal business to himself." He noticed something had been bothering Burdan for about a month before the murder, that his production had declined, and that Burdan would just sit and stare at the floor for long periods of time. The coworker had also seen Burdan crying.

The victim's sister, who was living with the Burdans at the time, revealed that the day before the murder, Burdan was acting

hostile and she was afraid something was going to happen. The victim's mother stated that the day before the murder, the victim told her she was staying with a friend because Burdan had beaten her up and she was afraid of him.

Burdan told the probation department in 1984 that he moved out of the home in October 1983 because of marital problems. He said he wanted a divorce, but the victim did not. He said he accused the victim of spending a lot of time with her coworker but she said it did not matter how he felt because she would continue doing as she pleased. Burdan said that a few days before the murder, he went to the other woman's home and saw her and his wife making love together. He confronted them and later told the victim to move out. Burdan acknowledged he slapped her. The next morning she moved out.

Burdan admitted borrowing the handgun from a friend and purchasing ammunition. He said the plan at the time was to kill himself. He said he arranged to meet the victim to discuss bills and, when she arrived at their home, got into the car with her. They smoked cigarettes and talked for a while. She eventually threw her wedding ring on the dashboard, and he did the same. She refused to discuss their marriage problems or her new lover.

At one point, the victim said, "'What are you going to do, kill me?'" Burdan pulled out the handgun and she grabbed it with both hands and started screaming. As they struggled over the gun, it went off. Burdan said he did not know how many times the gun went off but later learned it had been five times.

He said he then put the gun to his own head and pulled the trigger. However, it did not go off. He said he was trying to load another shell into the gun when Officer Hall arrived and took it from him. Burdan acknowledged trying to take Hall's gun from him to use on himself.

As noted above, Burdan entered a negotiated plea of guilty to second degree murder and was delivered to the custody of the Department of Corrections and Rehabilitation on June 29, 1984. The Board set a minimum parole eligibility date of June 7, 1992.

Between 1991 and 2002, Burdan appeared before the Board on seven occasions and was denied parole each time. On May 13, 2003, Burdan again appeared before the Board, but this time was found suitable for parole. However, on October 3, 2003, then Governor Davis reversed the Board's decision. Burdan's subsequent petitions for writ of habeas corpus in the superior court and this court were denied, and both the California Supreme Court and the United States Supreme Court denied review.

On January 1, 2005, Burdan filed a petition for writ of habeas corpus in the United States District Court challenging the Governor's 2003 parole decision.

On February 9, 2005, Burdan again appeared before the Board and the Board again found him suitable for parole. The Board specifically found Burdan "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison." Among other things, the Board cited the fact Burdan had no prior criminal record, has had reasonably stable relationships with others, has enhanced his ability to function

within the law through various programs and educational opportunities while in prison, has participated in a variety of self-help and therapy programs, has had no major infractions while in prison, and has a number of employable skills. The Board also found the 1983 murder was mitigated by the fact it resulted from significant stress in Burdan's life due to marital problems.

On June 29, 2005, Governor Schwarzenegger reversed the Board's second decision to grant parole. After first noting the various factors in favor of granting parole, as highlighted by the Board, the Governor concluded the gravity of the 1983 murder alone is enough to support a conclusion that Burdan's release on parole would pose an unreasonable risk to public safety.

Burdan filed a petition for writ of habeas corpus in the superior court, challenging the Governor's 2005 parole decision. The superior court denied the petition on August 7, 2006.

On June 29, 2007, Burdan filed the instant petition. On August 16, 2007, we issued an order to show cause to the Warden.

DISCUSSION

I

Introduction

Penal Code section 3041 addresses how the Board makes parole decisions for indeterminate life inmates. (Undesignated section references that follow are to the Penal Code.) Under subdivision (a), one year before the prisoner's minimum eligible parole date, a Board panel is to meet with the inmate, "shall

normally set a parole release date," and shall do so "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." (§ 3041, subd. (a).) This release date must "comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." (*Ibid.*) However, subdivision (b) specifies the circumstances under which a parole release date need not be fixed. It provides that a parole release date shall be set "unless [the Board] determines" the inmate is presently unsuitable for parole, i.e., that "the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." (§ 3041, subd. (b).)

Under Board regulations, the panel must determine whether the life prisoner is suitable for release on parole, and "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) A parole date set under these regulations "shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public." (*Id.*, § 2401.)

The regulations list six factors tending to show unsuitability for release on parole: (1) commission of the offense in an especially heinous, atrocious or cruel manner; (2) a previous history of violence; (3) an unstable social history; (4) prior sadistic sexual offenses; (5) a lengthy history of mental problems; and (6) serious misconduct in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c).) They also list nine factors tending to show suitability for parole: (1) the absence of a juvenile record; (2) a history of reasonably stable social relationships; (3) tangible signs of remorse; (4) the commission of the crime resulted from significant stress, especially if the stress had built over a long period of time; (5) battered woman syndrome; (6) lack of a history of violent crime; (7) increased age, which reduces the probability of recidivism; (8) marketable skills and a reasonable plan for the future; and (9) responsible institutional behavior. (*Id.*, § 2402, subd. (d).)

The importance of these factors is left to the discretion of the parole panel (Cal. Code Regs., tit. 15, § 2402, subds. (c), (d)), and judicial review of the Board's parole decisions is limited. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) "[T]he court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Id.* at p. 658, *italics added.*) "Only a modicum of evidence is required. Resolutions of any conflicts in the evidence and the weight to be given the evidence are matters within the authority

of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*Id.* at p. 677.)

Any parole decision by the Board is subject to review by the Governor. Article V, section 8, subdivision (b), of the California Constitution provides: "No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action."

The statutory procedures governing the Governor's review of a parole decision are set forth in section 3041.2. It states:

"(a) During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the parole authority.

"(b) If the Governor decides to reverse or modify a parole decision of a parole authority pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision."

The Governor's determination of the inmate's suitability for parole is subject to the same standards as that of the Board. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1086.) It is also subject to review under the same deferential "some evidence" standard. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 667.)

In *Lawrence* and *Shaputis*, the State Supreme Court clarified the standard for determining if "some evidence" supports the decision of the Board or the Governor. In particular, the court considered whether the appropriate focus is on whether there is "'some evidence' of the core statutory determination that petitioner remains a current threat to public safety, or merely 'some evidence' that supports the Governor's characterization of

facts in the record," and concluded it is the former.

(*Shaputis, supra*, 44 Cal.4th at p. 1254.) Where one or more factors are used to support a denial of parole, the relevant inquiry is whether those factors, when considered in light of the other factors in the record, are predictive of current dangerousness of the inmate. (*Shaputis, supra*, 44 Cal.4th at pp. 1254-1255.)

Burdan attacks the Governor's decision to reverse the Board's grant of parole on a number of fronts. He contends the Governor's decision is not supported by some evidence that his release would pose an unreasonable risk of danger to society. He also contends the Governor's review of the Board's decision violated the terms of his plea agreement because, at the time of the plea, the Governor did not have authority to review parole decisions and he was assured any parole decision would be made by the Board alone. Finally, Burdan contends the Governor's reversal of the Board's grant of parole violates ex post facto principles of the United States Constitution. As we shall explain, because we agree with Burdan's first contention, we need not consider the others.

II

Administrative Record

Burdan has filed a motion for an order requiring the Warden to file a copy of the administrative record reviewed by the Governor in making his parole decision. As justification for the motion, Burdan has expressed a concern that the Governor did

not consider the full administrative record that was before the Board at the time it granted parole.

We deny Burdan's motion. The Governor has indicated he considered the same factors as the Board, and his decision reflects knowledge of the same matters that were before the Board. The Governor is required to consider the same record as the Board, and we presume official duty has been regularly performed. (Evid. Code, § 664.) We find the record before us adequate to resolve the issues presented.

III

Timeliness

The Warden contends the petition should be denied as untimely. The Warden points out that the Governor reversed the Board's parole decision on June 29, 2005, but Burdan did not file his habeas petition in the superior court until a year later, on June 28, 2006. The Warden further points out that the superior court denied Burdan's petition on August 7, 2006, yet he did not file the instant petition until June 29, 2007, more than 10 months later and two years after the Governor's parole decision.

The Warden relies on a number of cases indicating that, absent a showing of good cause, a petition for writ of habeas corpus must be filed without substantial delay. (See *In re Sanders* (1999) 21 Cal.4th 697, 703-705; *In re Gallego* (1998) 18 Cal.4th 825, 831; *In re Clark* (1993) 5 Cal.4th 750, 765.) However, these are all capital cases where the petition was a

collateral attack on the underlying conviction. In *Sanders*, the high court explained the rationale for requiring a prompt petition: "By requiring that such challenges be made reasonably promptly, we vindicate society's interest in the finality of its criminal judgments, as well as the public's interest 'in the orderly and reasonably prompt implementation of its laws.' [Citation.] Such timeliness rules serve other salutary interests as well. Requiring a prisoner to file his or her challenge promptly helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories. In addition, we cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." (*In re Sanders, supra*, at p. 703.)

These same considerations do not apply where a life prisoner challenges a parole decision. The record before the Board or Governor is all on paper, so there is little risk of vital evidence being lost. Finality of the conviction, as to both society in general and the victims in particular, is not an issue. The only one potentially prejudiced by a delay in challenging a parole decision is the inmate himself. It is, after all, the inmate who must remain in prison after he or she might otherwise have been released on parole. Any delay in filing a petition challenging the denial of parole means a corresponding delay in the ultimate release date. (See *In re Bartlett* (1971) 15 Cal.App.3d 176, 186.) Because this is not a

situation where a grant of habeas relief would require a retrial of the criminal charges, there is no potential prejudice to the state.

At any rate, in *In re Clark*, *supra*, 5 Cal.4th 750, the State Supreme Court indicated a petition for writ of habeas corpus should be filed "as promptly as the circumstances allow." (*Id.* at p. 765, fn. 5.) Here, despite Burdan's assertion that counsel appointed for him in his federal court challenge to the Governor's 2003 parole reversal told Burdan that he would handle any challenge to the Governor's 2005 parole reversal, Burdan was unrepresented in this matter until we appointed counsel for him. We do not find a delay of 10 months for an unrepresented prison inmate to file a petition for writ of habeas corpus in the Court of Appeal, after denial of a similar petition in the superior court, to be unreasonable. We shall therefore turn to the merits of Burdan's petition.

IV

Sufficiency of the Evidence

As explained earlier, the Board found Burdan suitable for parole. The Board explained Burdan had no prior criminal record, has had reasonably stable relationships with others, has enhanced his ability to function within the law through various programs and educational opportunities while in prison, has participated in a variety of self-help and therapy programs, and has had no major infractions while in prison. The Board also noted Burdan has a number of employable skills that were

enhanced while in prison. Regarding the 1983 murder, the Board indicated Burdan "committed the crime . . . as a result of a significant stress in [his] life in that [he] and [his] wife had been having significant marital problems and in which [he] subsequently learned that she was having a lesbian affair with another woman."

The Board also noted Burdan has realistic parole plans, including a job offer and family support. The Board expressed its opinion, and that of a number of psychiatric evaluations, that Burdan shows appropriate remorse, understands the nature and magnitude of the offense, and accepts responsibility for his actions. The Board took note of Burdan's latest psychological evaluation, which states: "'Overall evaluating the three categories of risk for this inmate, history of problems, self-help and change, and realistic plans and support network, he is considered a low risk when it comes to potential future acts of violence. This conclusion is based on the extremely viewed actuarial risk factors present in this inmate's file, his lack of prior criminal record, lack of substance abuse, and overall productive life prior to his offense, stands out from most of the inmates within the Department of Corrections. The offense itself appears to have been a long, entangled, emotional event the likes of which are not likely to ever be duplicated again especially after all the positive gains this inmate has made.'"

In reversing the Board's decision, the Governor noted the factors supporting parole but nevertheless concluded the gravity of the 1983 murder alone supported denial. The Governor

explained: "[T]he existence of significant stress does not mitigate the severity of his crime enough for me to conclude that the murder he committed was not especially grave. It was, even if his claim is true about the first shot being unintentional. Mr. Burdan shot his wife numerous times at close range, striking her a total of five times in the head, neck and torso. The autopsy, as described in the probation officer's report, indicated that the gun was probably only a couple of inches away from Mrs. Burdan for one of the neck wounds and that a slug was recovered from her skull. According to the same report, the off-duty police officer heard at least five shots and stated that while the first three shots were in rapid succession, the last two shots occurred after he had gone into and returned from his house and were spaced 'four or five seconds apart roughly.' Moreover, the same officer reported that the firing mechanism of the gun required that the user physically cock the hammer before pulling the trigger, and that when he told Mr. Burdan he was going to check Mrs. Burdan's condition just after the shootings, Mr. Burdan stated something to the effect of, 'Don't bother. She's dead.' Mr. Burdan chose to repeatedly cock and fire the gun at his wife. As he told the 2005 Board, at some point after the initial gunshot, Mr. Burdan 'knew what [he] was doing' and 'didn't want her to suffer.' Under these circumstances, the second-degree murder of which Mr. Burdan was convicted was especially grave because, although not his initial plan, he decided at some point to kill his wife and then did so intentionally and deliberately by shooting her

multiple times at close range. This factor alone is enough for me to at this time conclude that his release from prison would pose an unreasonable public-safety risk."

Reduced to its essence, the Governor's explanation amounts to this: (1) Burdan continues to pose an unreasonable risk to public safety because of the gravity of the commitment offense; and (2) the commitment offense was especially grave because Burdan decided at some point during the struggle to kill his wife and did so by deliberately shooting her multiple times at close range.

As explained earlier, one of the factors suggesting unsuitability for parole is that the murder was committed "in an especially heinous, atrocious or cruel manner." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) The elements to be considered in assessing the gravity of the commitment offense include: "(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

The Warden contends one of the foregoing factors applies here, because the murder "was carried out in a dispassionate and calculated manner." According to the Warden, Burdan purchased

ammunition, borrowed a handgun under false pretenses, arranged to meet his wife, and shot her five times at close range while being required to cock the gun before each shot.

It is hard to see how the 1983 murder of Mrs. Burdan can possibly be characterized as one that was done in a "dispassionate and calculated manner, such as an execution-style murder." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B).) The very essence of the offense was one of passion. And far from being calculated, even the Governor accepted that Burdan might not have intended to kill his wife initially. The murder took place in a residential area next door to the home of a police officer. Officer Hall described Burdan as emotionally upset, shaking, nervous and distraught after the shooting. As for the other factors relevant to the gravity of the offense, there were no multiple victims, Mrs. Burdan was not abused, defiled or mutilated, the murder was not carried out in a manner demonstrating an exceptionally callous disregard for human suffering, and Burdan's motives were not inexplicable or very trivial.

At any rate, in *In re Dannenberg*, *supra*, 34 Cal.4th at page 1095, the California Supreme Court indicated that, where the nature of the commitment offense is used as a basis for denying parole, the requirement that the offense be particularly egregious is meant to convey "only that the violence or viciousness of the inmate's crime must be more than *minimally necessary to convict him* of the offense for which he is confined." As explained by the court: "In some circumstances,

a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation--for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense. Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. . . .' (. . . § 3041, subd. (a).) 'The Board's authority to make an exception [to the requirement of setting a parole date] based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is 'normally' to be granted. Otherwise, the Board's case-by-case rulings would destroy the proportionality contemplated by . . . section 3041, subdivision (a), and also by the murder statutes, which provide distinct terms of life without possibility of parole, 25 years to life, and 15 years to life for various degrees and kinds of murder. (. . . § 190 et seq.)" (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 683.)

The Warden contends the facts and circumstances surrounding the 1983 murder of Mrs. Burdan were more than the minimal necessary to convict him of second degree murder, "given the elements of premeditation highlighted by the Governor." In his decision reversing the Board, the Governor mentioned the following aspects of the crime: "On the day of the murder, Mr. Burdan purchased ammunition and borrowed a gun from a friend,

claiming it was for target practice. He then made arrangements to meet his wife to talk later that evening."

The fact that Burdan entered a negotiated plea of guilty to second degree murder does not preclude the Governor from considering particular aspects of the crime beyond its basic elements. (See *In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 678-679 [holding that a jury verdict acquitting the defendant of first degree murder did not preclude the Governor from considering evidence of premeditation in assessing parole eligibility].) Thus, while second degree murder does not involve premeditation, the Governor may consider facts suggesting Burdan planned and prepared for the murder.

However, the Governor did not rely on evidence of premeditation in concluding the gravity of the offense warranted the denial of parole. Rather, the Governor stated: "[T]he second-degree murder of which Mr. Burdan was convicted is especially grave because, although not his initial plan, he decided at some point to kill his wife and then did so intentionally and deliberately by shooting her multiple times at close range." In other words, the Governor assumed Burdan did not initially plan to kill his wife, which would negate any suggestion of premeditation. Burdan may well have obtained a gun and ammunition in advance, but this may have been for the purpose of killing himself, as he claims.

Given the deferential standard of review applied to the Governor's parole decisions, it is "inappropriate for courts to salvage the [Governor]'s inadequate findings by inferring

factors that might have been relied upon. *At minimum*, the [Governor] is responsible for articulating the grounds for [his] findings and for citing to evidence supporting these grounds." (*In re Roderick* (2007) 154 Cal.App.4th 242, 265.) "We must confine our review to the stated factors found by the [Governor], and all the evidence presented at the parole hearing which is relevant to those findings, not to findings that . . . the [Governor] might have made." (*In re DeLuna* (2005) 126 Cal.App.4th 585, 593-594.)

As explained above, the Governor's justification for finding the 1983 murder was particularly egregious is that Burdan decided at some point during the encounter to kill his wife and did so by deliberately shooting her multiple times at close range. However, the fact that Burdan intentionally killed his wife does not add anything to the analysis, inasmuch as malice is one of the minimal elements of second degree murder (see §§ 187-189) and malice involves either an intent to kill or an intent to commit an act, the natural consequences of which are dangerous to human life. (See *People v. Cortez* (1998) 18 Cal.4th 1223, 1229; *People v. Saille* (1991) 54 Cal.3d 1103, 1114-1115.) Thus, the Governor's justification for denying parole is reduced to the fact that he shot his wife multiple times at close range.

The fact that Burdan shot his wife multiple times at close range following a struggle in her car over the gun does not demonstrate the crime was particularly egregious, atrocious or heinous. As noted above, Burdan did not attack, injure or kill

multiple victims; did not carry out the offense in a dispassionate and calculated manner, such as an execution-style murder, or in a manner which demonstrates an exceptionally callous disregard for human suffering; and the motive for the crime was not inexplicable or very trivial. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) The fact that Burdan shot his wife several times may suggest nothing more than that he intended to kill her, given that, even after the five shots, she remained alive for some period of time. (See *In re Elkins* (2006) 144 Cal.App.4th 475, 496-497 ["On the facts of this case, with the victim continuing to move after a first blow, Elkins had to strike his victim multiple times in order to kill him"].) And the close range of the shots appears to be more a function of the confined quarters of the car than a particular callousness.

"[A]ll second degree murders by definition involve some callousness--i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and sufferings of others.'" (*In re Scott* (2004) 119 Cal.App.4th 871, 891.) "The measure of atrociousness is not general notions of common decency or social norms, for by that yardstick all murders are atrocious. [Citation.] Rather, the inquiry is whether among murders the one committed by [Burdan] was particularly heinous, atrocious or cruel. [Citations.]" (*In re Lee, supra*, 143 Cal.App.4th at p. 1410.)

But even assuming the commitment crime was marginally more heinous, atrocious or cruel than the typical second degree

murder, this alone will not support the Governor's decision. As explained earlier, the relevant test is not whether some evidence supports the reasons cited for denying parole, but whether some evidence supports "the core statutory determination that petitioner remains a current threat to public safety." (*Shaputis, supra*, 44 Cal.4th at p. 1254.) Thus, where the circumstances of the commitment offense are used to justify the denial of parole, "the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Shaputis, supra*, 44 Cal.4th at pp. 1254-1255.) "[T]he Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light

of the full record before the Board or the Governor."

(*Lawrence, supra*, 44 Cal.4th at p. 1221.)

In *Lawrence*, the petitioner murdered her lover's wife in 1971 by shooting and stabbing her repeatedly and, after remaining a fugitive for 11 years, voluntarily turned herself in. She was convicted of first degree murder and sentenced to life imprisonment. (*Lawrence, supra*, 44 Cal.4th at p. 1190.) In 2005, the Board found the petitioner suitable for parole and set a parole date, emphasizing multiple statutory factors favoring suitability, including her exemplary record of rehabilitation, her acceptance of responsibility for the crime, her realistic parole plans, and her close ties to family. (*Ibid.*) However, the Governor reversed the Board, finding the gravity of the commitment offense alone indicated the petitioner remained unsuitable for parole. (*Ibid.*)

The Supreme Court concluded the Governor's decision was not supported by some evidence that the petitioner remained a threat to public safety in light of overwhelming evidence to the contrary. In particular, the court noted: "Petitioner was incarcerated for nearly 24 years and during that period had an exemplary record of conduct. She participated in many years of rehabilitative programming specifically tailored to address the circumstances that led to her commission of the crime, including anger management programs as well as extensive psychological counseling, leading to substantial insight on her part into both the behavior that led to the murder and her own responsibility for the crime. Petitioner repeatedly expressed remorse for the

crime, and had been adjudged by numerous psychologists and by the Board as not representing any danger to public safety if released from prison." (*Lawrence, supra*, 44 Cal.4th at p. 1226.) The court continued: "In light of petitioner's extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board at successive hearings--decisions reversed by the Governor based solely upon the immutable circumstances of the offense--we conclude that the unchanging factor of the gravity of petitioner's commitment offense had no predictive value regarding her *current* threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." (*Ibid.*)

By contrast, in *Shaputis, supra*, 44 Cal.4th 1241, the high court concluded some evidence supported the Governor's reversal of a parole grant, where evidence in the record supported a conclusion that the circumstances of the commitment offense continued to be predictive of current danger to society despite the petitioner's discipline-free record in prison. The court specifically noted the petitioner "has failed to take responsibility for the murder of his wife, and despite years of rehabilitative programming and participation in substance abuse programs, has failed to gain insight into his previous violent

behavior, including the brutal domestic violence inflicted upon his wife and children for many years preceding the commitment offense." (*Shaputis, supra*, 44 Cal.4th at p. 1246.)

In the present matter, the Board granted Burdan parole in both 2003 and 2005. In concluding Burdan no longer posed an unreasonable risk of danger to society or a threat to public safety, the Board cited that Burdan had no prior criminal record; has had a "stable social history as exhibited by reasonabl[y] stable relationships with others"; has "enhanced [his] ability to function within the law through [his] participation in a variety of programs," including educational programs and vocational training, while in prison; has "participated in a variety of self-help and therapy programs"; has had no major infractions while in prison; and has a number of employable skills. The Board also found the 1983 murder was mitigated by the fact it resulted from "significant stress" in Burdan's life due to marital problems. The Board further noted Burdan was 33 years old at the time of the offense and, at the time of the parole hearing, was 54; has "realistic parole plans" that include a job offer and family support; and has maintained close family ties while in prison. The Board expressed its opinion, as well as that of several psychiatric evaluations, that Burdan shows "appropriate kinds of remorse," "understand[s] the nature and magnitude of the [commitment] offense," has "accepted responsibility for [his] criminal behavior," and has a "desire to change towards better citizenship."

In his decision to deny parole, the Governor did not dispute any of the foregoing assessments by the Board. Instead, the Governor concluded those factors were all overridden by the gravity of the commitment offense.

"[T]he statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1211.) In assessing the gravity of a particular crime, it must be kept in mind that "[t]he commitment offense is one of only two factors indicative of unsuitability a prisoner cannot change (the other being his 'Previous Record of Violence'). Reliance on such an immutable factor 'without regard to or consideration of subsequent circumstances' may be unfair [citation], and 'runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation.' [Citation.] The commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison. Yet, the predictive value of the commitment offense may be very questionable after a long period of time. [Citation.] Thus, denial of release based solely on the basis of the gravity of the commitment offense warrants

especially close scrutiny." (*In re Scott* (2005) 133 Cal.App.4th 573, 594-595, fns. omitted; accord *In re Elkins, supra*, 144 Cal.App.4th at p. 496.)

Where, as here, all postconviction evidence in the record supports the determination that the inmate has been rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed this evidence nor related the commitment offense to current circumstances to suggest the inmate will continue to pose a danger if released, "mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability" for parole. (*Lawrence, supra*, 44 Cal.4th at p. 1227.) Under these circumstances, Burdan's due process and statutory rights were violated by the Governor's decision to deny parole based solely on the immutable and unchangeable circumstances of Burdan's commitment offense.

The Warden contends we should remand this matter to the Governor for further consideration in light of *Lawrence* and *Shaputis*. He cites *In re Rosenkrantz, supra*, 29 Cal.4th at page 658, where the Supreme Court concluded that if the Board's denial of parole is not supported by the evidence, the proper remedy is to grant the petition for writ of habeas corpus and order the Board "to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." However, to "proceed in accordance with due process of law" does not mean the Board, or the Governor, is to be given an

opportunity to reconsider the parole decision. Rather, where, as here, it is determined there is not "some evidence" in the record to support the Governor's decision to overrule the Board's grant of parole, the proper remedy is to vacate the Governor's decision and to reinstate that of the Board. (See *Lawrence, supra*, 44 Cal.4th at pp. 1190, 1229 [affirming a Court of Appeal decision to vacate the Governor's denial of parole and reinstate the Board's grant of parole].)

DISPOSITION

The petition for writ of habeas corpus is granted. The Governor's decision reversing the Board's grant of parole is vacated and the Board's decision is reinstated.

_____, HULL, J.

We concur:

_____, BLEASE, Acting P. J.

_____, ROBIE, J.